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C v A (No 2)

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S2-33-861 OF 1997
KAMALANATHAN RATNAM J
3 DECEMBER 1998

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Family Law *— Financial obligation — Maintenance of wife — Obligation of husband to maintain wife — Whether obligation absolved if wife has money of her own*

The wife ('the respondent') applied for maintenance for herself of a sum of RM600 per month pursuant to s 77(1)(b) of the Law Reform
C (Marriage and Divorce) Act 1976 ('the Act'). It was urged that merely because a wife has money of her own does not absolve the husband's obligation from maintaining her.

Held:

D The husband was not relieved of his duty to maintain his wife even if she had had money of her own (see p 103I–104B); *Raquiza v Raquiza* [1947] MLJ 202 followed. It is then necessary to try and place the parties, so far as it may be practicable, in the financial position in which they would have been if the marriage had not broken down and each party had in actual fact discharged his or her financial and other
E obligations and responsibilities to one another. On the facts, it was ordered that the petitioner was to pay the respondent a lump sum of RM10,000 as a full and final payment of maintenance (see p 104C–F).

F **[Bahasa Malaysia summary**

Si isteri ('penentang') memohon untuk penyenggaraan bagi dirinya sebanyak jumlah RM600 sebulan menurut s 77(1)(b) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'). Adalah dihujahkan bahawa hanya kerana seseorang isteri mempunyai wang sendiri tidak membebaskan si suami daripada
G kewajipan menanggungnya.

Diputuskan:

Si suami tidak bebas daripada kewajipan untuk menanggung isterinya biarpun ia mempunyai wang sendiri (lihat ms 103I–104B); *Raquiza v*
H *Raquiza* [1947] MLJ 202 diikut. Maka ia menjadi perlu untuk mencuba meletakkan pihak-pihak, sejauh mana yang boleh dilaksanakan, dalam kedudukan kewangan yang mana mereka akan berada sekiranya perkahwinan tidak retak dan setiap pihak pada hakikatnya telah menjalankan obligasi kewangan dan obligasi serta tanggungjawab lain antara satu sama lain. Atas fakta-fakta, ia
I diperintahkan bahawa pempetisyen hendaklah membayar penentang sejumlah sebanyak RM10,000 sekaligus sebagai bayaran penuh dan muktamad penyenggaraan (lihat ms 104C–F).]

Notes

For cases on maintenance of wife, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1991–1994.

Cases referred to

C v A [1998]6 MLJ 222 (refd)
Raquiza v Raquiza [1947] MLJ 202 (folld)
Sengol v De Witt [1987] 1 MLJ 201 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 77(1)(b), 78
Married Women and Children (Maintenance) Act 1950 s 3(1)

Sonia Abraham (*Azman Davidson & Co*) for the applicant/respondent.
Theresa George (*Thakurdas Jethwani & Co*) for the respondent/petitioner.

Kamalanathan Ratnam J:

Facts

The facts in relation to this case have been set out by me in deciding an earlier issue in respect of this same case (see *C v A* [1998]6 MLJ 222).

The application

This is the application (encl 18) of the respondent seeking maintenance for herself of a sum of RM600 per month pursuant to s 77(1)(b) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which empowers the court to order a man to pay maintenance to his wife, when granting or subsequent to the grant of a decree of divorce or judicial separation. Parties have agreed that I do make an order for the dissolution of the marriage together with my decision in respect of encl 18.

Court's findings

Ms Abraham for the respondent submitted that in assessing the proper sum for maintenance I must consider the salutary advice as stated in s 78 of the Act which reads:

> In determining the amount of any maintenance to be paid by a man to his wife or former wife or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

I was referred to the respondent's affidavit in support which showed that she was receiving a monthly income, together with allowances, of RM1,221. She had to pay a monthly instalment towards her housing loan amounting to RM455.59 leaving a nett balance of RM765.41 per month. In addition,

her brother who stays with her gives her a further RM150 per month giving her a total income of RM915.41 and not RM855.41 as averred by her in her affidavit. She has also in her affidavit tabulated her detailed expenses as amounting to RM620 which I find reasonable. She has also shown that upon retirement, she would be drawing a monthly pension of RM502 and would also receive a gratuity of RM22,000. She has also disclosed that her account with the Employees Provident Fund stands at RM35,525.19. She also has a sum of RM4,926.99 as savings in the Standard Chartered Bank Bhd. She also has a sum of RM11,836.78 as savings with the Koperasi Koswip Malaysia Bhd. She has also averred that her house has been attacked by termites and she exhibited a bill from a contractor amounting to RM18,000.

She stated that she had worked hard for 36 years often taking two jobs to support herself and her two children after the petitioner had deserted her. As she was already nearing 55 years she averred that it would be difficult for her now to get another job. It was urged upon me that merely because a wife has money of her own does not absolve the husband's obligation from maintaining her.

On the other hand, the petitioner has filed an affidavit in which he has exhibited sufficient proof to show an income per month of RM804.30 inclusive of all allowances. In addition, he gets an average overtime income of RM150. The petitioner has been living with another woman and has a child 12 years old who is still studying, whereas the two children born to the respondent are themselves now married. He will be retiring from the Army in July 1999 and his pension upon retirement would amount to RM450 per month. In addition thereto, he has only recently succeeded in obtaining a Government loan of RM32,666 for the purchase of a low cost house and he has to pay instalments amounting to RM172.42 for a further 300 months. His savings with the Employees Provident Fund stands at RM19,501.63 and on retirement he would receive a sum of RM21,665.05 as gratuity less RM3,000 which he has to pay back to the Army. In addition thereto, he has a sum of RM3,000 with Standard Chartered Bank Bhd.

Having considered all these facts, I now have to balance each of these facts with the guidelines set by s 78 of the Act. Primarily, I have to consider the degree of responsibility which the court would apportion to each party for the break up of the marriage.

Looking at the petition, I find that the petitioner left the matrimonial home and set up his own home due to misunderstandings between the parties. Cohabitation was resumed during the early part of 1976 at the petitioner's home but the respondent left in the later part of 1976. Since then, neither party had anything to do with the other and they had lived apart for more than 20 years. The respondent filed an application (encl 16) seeking leave to file for interim relief upon which I granted an order. She had not in any affidavit denied the averments contained in the petition.

Notwithstanding that, it is my judgment that it was incumbent upon the husband then, to have at least maintained his wife and two infant children. That obligation to maintain them remained his duty always and he was not

relieved of that duty to maintain his wife even if she had had money of her own (see *Raquiza v Raquiza* [1947] MLJ 202). He was bound by the Married Women and Children (Maintenance) Act 1950 (as revised in 1981). Section 3(1) provides as follows:

> If any person neglects or refuses to maintain his wife ... a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife ... in proportion to the means of such person, as to the court seems reasonable.

What reasons the respondent had for leaving the petitioner as of 1976 I will never know. Whilst I agree that I am not here making an order under the Married Women and Children (Maintenance) Act 1950, but under s 77 of the Act, I must also bear in mind whether in the circumstances I ought to make a lump sum award, always bearing in mind that the order of maintenance should not leave either the husband or the wife, destitute (see *Sengol v De Witt* [1987] 1 MLJ 201). In my view, it is necessary to try and place the parties, so far as it may be practicable, in the financial position in which they would have been if the marriage had not broken down and each party had in actual fact discharged his or her financial and other obligations and responsibilities to one another. The court would have to consider what the position would be if the wife had not left the husband and had done her uxorial duties and the court would also have to consider what the position would be if the husband had done his duty of maintaining the family. Taking all these into consideration and the fact that the respondent will have substantial savings and that she is an assistant nurse whose services will at all times be in want, and considering the fact that the petitioner has another family to support in addition to paying for a home, and considering the 'means and needs' test set out in s 78 of the Act, I order that upon receipt of his gratuity from the government, the petitioner is to pay the respondent a lump sum of RM10,000 as a full and final payment of maintenance. It is only proper that I make a 'clean break' order since both parties are at retiring age and have their own respective lives to lead. Each party will bear its own costs.

Order accordingly.

Reported by Loo Lai Mee